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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 210

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, AS ADMINISTRATOR OF THE ESTATE OF JAMES PATRICK MAHAR, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

OPINIONS

The opinion of the Circuit Court of Appeals is reported in 69 Fed. (2d) 526, and appears in the Record, pp. 174-182.

The opinion of the District Court is in the Record, pp. 88-92.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U.S.C. §347. Certiorari was granted October 8, 1934, on a petition filed July 21, 1934. (Time extended June 2, 1934.)

STATEMENT OF THE CASE

The facts were stated in the petition for certiorari, pp. 2-4, and are found in the "Findings of Fact," by the District Court (R. 93-96) which are adopted as a part of this brief.* They are discussed in the argument *infra* pp. 16-31.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to the brief in support of the petition (pp. 20-23) and in the brief of the respondent in opposition thereto (pp. 13-21). A correct statement of Regulations 14 and 15 (Respondent's opposition brief, pp. 19-21), will be found in this brief, in the argument *infra* pp. 17, 18.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that in administering the Government Life Insurance Fund the Government is not to be regarded as an ordinary insurance company.

* This estate, which consists solely of the insurance in question, has been sadly depleted by the expense of litigation in three courts, and to save as much as possible for the widow and children of the veteran it is sought to avoid reprinting the facts and arguments advanced in the petition for writ of certiorari by making proper reference thereto and adopting same as part of this brief, and confining this brief to new matter. Counsel pray the indulgence of the Court.

2. In holding that there was no estoppel and the policy lapsed for the non-payment of the premium due September 1, 1927.

3. In holding that the failure to pay premiums prior to October 2, 1927, resulted in a lapse of the policy which may not now be held to be waived by the conduct of the Government's employees.

SUMMARY OF ARGUMENT

I

The Government is engaged in Life and Disability Insurance business in competition with commercial insurance companies.

Policies are written in all usual and familiar forms of life, total disability, and total and permanent disability insurance. *Standard Oil Co. of N. J.* v. *United States,* 267, U. S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519.

Losses other than those due to the extra hazards of war or of military and naval service in time of peace, are paid from the Government Life Insurance Fund which is derived exclusively from the premiums paid by policyholders, from interest on investments of the Fund in Government securities and loans on policies and adjusted service certificates, and dividends withheld from policy holders. The point is fully covered in the brief accompanying the application for writ of certiorari (pp. 9-18) to which reference is respectfully made.

HENCE: AS TO SENDING OUT NOTICES, APPLYING PREMIUMS, AND OBEYING CUSTOMS THE GOVERNMENT IN OPERATING THE GOVERNMENT LIFE INSURANCE FUND IS OBLIGATED TO THE SAME RULES

AS ITS COMPETITORS. Opinion of Judge Bryant, R. 96.

II

The Government is subject to estoppel and in dealing with holders of Government Life Insurance Policies it may be bound by the acts of its agents.

This principle is well established. The acts or omissions of its officers if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government. *Walker* v. *United States* (C.C., M.D. Ala.) 139 Fed. 409; *Ritter* v. *United States*, 28 Fed. (2d) 265.

There is no contention that the acts or omissions of the officers of the Government concerned with the transactions in the instant case were not within the scope of their authority. That the Government may be estopped was decided by this Court in *Jay Cooke et al.* v. *United States*, 91 U.S. 389, 23 L. ed. 237. See also *McArthur* v. *United States*, 258 U.S. 6, 42 Sup. Ct. Rep. 225, 66 L. ed. 433, 436, and other cases cited *infra.*

III

Upon a given state of facts its liability is the same as that of any other insurer.

HENCE IT IS ESTOPPED TO DENY PAYMENT OF INSURANCE IN THIS CASE BECAUSE OF THE CONDUCT OF ITS AGENTS.

July 1, 1927, Mahar, the insured, and a veteran of the World War, duly submitted his application for the reinstatement of his war risk yearly renewable term in-

surance, with a remittance of $13.90 to be applied to premiums. The Veterans Bureau disregarded his allocation of the amount remitted but approved his application, and in September, 1927, issued a Government Life Insurance Policy of the Five Year Convertible Term type. Later it received two additional premiums of $3.95 each. All of the remittances were retained and no attempt was made to return them during the life of the insured. *Phoenix Mutual Life Insurance Co.* v. *Doster*, 106 U.S. 30, 27 L. ed. 65.

In January, 1928, after Mahar's death on December 24, 1927, and nearly four months after the policy was issued, the Bureau for the first time advised him that his insurance had lapsed August 31, 1927 for the non-payment of the premium due September 1, 1927 (R. 140). No attempt was made during his lifetime to so inform him, or to return the excess premiums, and it was not until March 21, 1928 (R. 145), that those interested were advised of the disposition of the remittance of $13.90 made by Mahar July 1, 1927. The record shows that by its own account the Bureau had on hand on September 1, 1927, $2.65 to apply to the September premium. It issued the policy in September but failed to inform the insured that the premium for that month was short by $1.30 or any other amount. The insurance matured by reason of the total and permanent disability of the insured on October 17, 1927 (R. 94), and the respondent acting for the Government Life Insurance Fund is estopped to deny that the insurance was in force on said date. *New York Life Insurance Co.* v. *Eggleston*, 96 U.S. 572, 24 L. ed. 841, 842; *Hartford Life and Annuity Insurance Co.* v. *Unsell*, 144 U.S. 439, 36 L. ed. 496, and other cases cited *infra*.

INTEREST SHOULD BE ALLOWED

IV

Interest was sought from December 24, 1927, as well as costs, but they were not allowed by the judgment. The Government Life Insurance Fund has profited by interest on the $5,000 due on this policy for nearly seven years. Equity and justice require that the Fund shall be liable for this interest to the estate of the insured. *Standard Oil of N. J.* v. *United States, supra.* It should also be liable for costs. *McMaster* v. *New York Life Ins. Co.,* 183 U. S. 25, 46 L. ed. 64, 74.

ARGUMENT

I

THE GOVERNMENT IS ENGAGED IN LIFE AND DISABILITY INSURANCE BUSINESS IN COMPETITION WITH COMMERCIAL INSURANCE COMPANIES.

This point is fully covered in the brief accompanying the petition for writ of certiorari (pp. 9-18) and the argument therein presented is adopted and reaffirmed. Data for the fiscal year ended June 30, 1933, is there presented, and the report of the Administrator of Veterans Affairs for the fiscal year ended June 30, 1934, is not yet compiled. Such statistics as are available show no change in the picture presented in the petition.

In the argument in the brief in opposition to certiorari respondent extolled the generosity of the Government in relieving the Government Life Insurance Fund of the burden of insurance benefits payment of which may be ascribed to the the "hazards of war" or "traceable to the extra hazards of the military or naval serv-

ice," depending upon which section of the Act is under consideration. But this is no favor to the policy holders, but only justice, for it would be exceedingly unjust to load upon them the liabilities of the poor risks due to war service or the extra hazards of the military and naval service in time of peace. Not only has the Government retained all of the premiums paid prior to the conversion of the policies but when the Government assumes the liability because of extra hazards it also takes over all the reserves on such policies. On the other hand if the insured became a poor risk while his term policy was in force and not due to the extra hazards, and soon after the conversion of his insurance became totally and permanently disabled or died, the Government keeps all the premiums on the term insurance and the Government Life Insurance Fund pays the insurance benefits.

It is admitted that the Government is at some expense looking after the extra hazard risks and separating the premiums and payments, but those risks are due to employment in its service and it is merely caring for its own obligations. As for the remainder of the administrative expense connected with the Government Life Insurance Fund petitioner understands it is immaterial. The policies are solicited and written by Government employees in connection with their other duties. The physicians who examine the applicants for insurance or for insurance benefits are the same physicians who examine claimants for pensions, compensation and term insurance benefits, staff the hospitals and soldiers' homes, and give out-patient treatment. The lawyers and rating experts who decide upon the claims either originally or on appeal, are engaged for

far the greater part of their time on other claims. It is doubtful if out of the 35,000 or more employees of the Veterans Administration as many as 100 are exclusively engaged upon work connected with the Government Life Insurance Fund at an annual expense of $250,000 out of a total appropriation for administrative purposes of $89,760,000. Comparatively speaking the additional expense is certainly trivial.

In this connection attention is invited to the following extract from a Press News Release by the Veterans Administration for February 16, 1934:

> "General Frank T. Hines, Administrator of the Veterans Administration, announced today that he has just received from ..... and ....., of New York City, internationally known consulting actuaries, a report on the condition of the United States Government Life Insurance Fund, together with accompanying recommendations, upon which will be based future policy in regard to the maintenance of reserves, the payment of dividends, and other kindred matters. The study of the condition of the United States Government Life Insurance Fund was ordered some time ago by General Hines *so as to assure that the affairs of the Fund were being conducted in accordance with established and accepted insurance practice* * * * United States Government Life Insurance is of the character of mutual insurance, the income being maintained in a trust account separate from other moneys in the Treasury and not commingled therewith. The Fund is administered by the United States for the benefit solely of the policy holders, and the Government enjoys no benefits whatsoever." (Italics supplied.)

HENCE: AS TO SENDING OUT NOTICES, APPLYING PREMIUMS, AND OBEYING

CUSTOMS, THE GOVERNMENT IN OPERATING THE GOVERNMENT LIFE INSURANCE FUND IS OBLIGATED TO THE SAME RULES AS ITS COMPETITORS.

Opinion of Judge Bryant, R. 96.

Standard Oil Co. of N. J. v. *United States*, 267 U.S. 76, 45 Sup. Ct. Rep. 211, 69 L. ed. 519.

State Bank and Trust Co. v. *United States*, 16 Fed. (2d) 439 (CCA 6), certiorari denied April 18, 1927.

Loveland v. *United States*, 18 Fed. (2d) 585, 25 Fed. (2d) 447, (CCA 3d); certiorari granted June 4, 1928, 72 L. ed. 686; error confessed, January 14, 1929, 73 L. ed. 571.

Phoenix Mutual Life Insurance Co. v. *Doster*, 106 U.S. 30, 27 L. ed. 65.

N. Y. Life Insurance Co. v. *Eggleston*, 96 U.S. 572, 24 L. ed. 841-842.

Mutual Life Ins. Co. v. *Hurni*, 263 U.S. 167, 44 Sup. Ct. Rep. 90, 68 L. ed. 235, 239.

In *United States* v. *Warren Transportation* Co., 7 Fed. (2d) 161, the court, in referring to the U. S. Shipping Board Emergency Fleet Corporation said:

> "In executing this contract the corporation through its agents was entering upon a purely commercial transaction. It was not by that act exercising any governmental function; it was exercising what some courts have called 'business powers of the United States'."

In the argument of the famous case of *Jay Cooke et al.* v. *United States*, before this Court, Messrs. Edwards Pierrepont, the Attorney General, and S. F. Phillips, the Solicitor General of the United States, appearing

for the defendant said, "We admit that when the United States engages in commercial business it does so in general submission to the principles of law which, in such business, apply to private persons."

Commenting upon this phase of the case this Court, through Chief Justice Waite, said:

> "It was conceded in the argument that when the United States became parties to commercial paper they incur all the responsibilities of private persons under the same circumstances. *This is in accordance with the decisions of this court.*" (Italics ours.) *Jay Cooke et al.* v. *United States*, 91 U.S. 389, 23 L. ed. 237.

The latest expression of the views of this Court is found in *Lynch* v. *United States*, and *Wilner* v. *United States*, decided June 4, 1934, 292 U. S. 571, 78 L. ed. 997. Speaking through Mr. Justice Brandeis the Court said:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[6]
>
> [6] Compare *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 392; *The Floyd Acceptances*, 7 Wall. 666, 675; *Garrison* v. *United States*, 7 Wall. 688, 690; *Smoot's Case*, 15 Wall. 36, 47; *Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 144; *Cooke* v. *United States*, 91 U. S. 389, 396; *United States* v. *Smith*, 94 U. S. 214, 217; *Hollerbach* v. *United States*, 233 U. S. 165, 171; *Reading Steel Casting Co.* v. *United States*, 268 U. S. 186, 188; *United States* v. *National Exchange Bank*, 270 U. S. 527, 534.

II

THE GOVERNMENT IS SUBJECT TO ESTOPPEL AND IN DEALING WITH HOLDERS OF GOVERNMENT LIFE INSURANCE POLICIES IT MAY BE BOUND BY THE ACTS OF ITS AGENTS.

This principle of insurance law is too well established to require extended discussion, and the same may well be said of the doctrine of estoppel to the Government under certain circumstances. A few citations, however, may be helpful in crystallizing thought on this point.

In the case of *Walker* v. *United States* (C.C., M.D. Ala.) 139 Fed. 409, Walker, a former U. S. Marshal had brought suit to recover certain disallowed claims for mileage fees and expenses. The United States interposed the statute of limitations and later set up a counter-claim, contending the statute of limitations did not run against it.

In its opinion the court said:

> "The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government. *Lindsey* v. *Hawes*, 2 Black. 560, 17 L. ed. 265; *Doris* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *United States* v. *Bank of Metropolis*, 15 Pet. 392, 10 L. ed. 774; *Sinking Fund Cases*, 99 U.S. 710, 25 L. ed. 496; *United States* v. *Barker*, 12 Wheat. 559, 6 L. ed. 728; *Cooke* v. *United States*, 91 U.S. 398, 23 L. ed. 237; *Duval* v. *United States*, 25 Ct. Cl. 60; *Hartson* v. *United States*, 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of

> their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application.

The Walker case was affirmed by the Circuit Court of Appeals, *per curiam*, for the reasons given by the District Judge, 148 Fed. 1022.

There is no question here that the officers of the government concerned with the transaction involved in this case were acting, or failing to act, within the scope of their authority.

That it was anticipated that such questions as are presented here would arise in certain cases is indicated in Paragraph 21 of the policy issued to Mahar (R. 134), which reads, in part:

> "No person except the Director of the United States Veterans Bureau may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind the United States by making any promise respecting any benefits hereunder."

By Section 5 of the World War Veterans Act, 1924, as amended, it is provided:

> "All officers and employees of the bureau shall perform such duties as may be assigned to them by the director. All official acts performed by such officers or employees specially designated therefor

by the director shall have the same force and effect as though performed by the director in person." §5, 43 Stat. 608.

The same officers approved the application for reinstatement, issued the policy, accepted the premiums, applied or failed to apply them, and failed to advise the insured as to the status of his insurance.

The Government having given its consent to be sued can claim no optional or selective immunity from the application of any one or another rule of law or equity. As the court further said in the *Walker* case, *supra,*

> "The sovereign has no prerogative to compel his courts to depart from the fixed principles of justice when he enters their portals to adjust his business transactions with his own citizens."

When the United States is a party litigant it assumes one of two characters. It appears either in the character of a sovereign or in the character of a contractor. *United States* v. *Warren Transportation Co., supra.*

In *McArthur Bros. Co.* v. *United States,* 258 U. S. 6, 42 Sup. Ct. Rep. 225, 66 L. ed. 433, 436, this court through Mr. Justice McKenna referred to a number of cases cited by appellants to show the liability of the United States under a contract made, it was alleged, as the result of misrepresentations by agents of the Government. "A systematic explanation of the cases," said the Court, "would extend this opinion to too great a length. They all declare the principle that the government will be liable in the same circumstances that private individuals would be liable, * * *."

Also:

United States v. *Smith,* 256 U. S. 11, 65 L. ed. 808 41 Sup. Ct. Rep. 413.
United States v. *Atlantic Dredging Co.,* 253 U. S. 1, 64 L. ed. 735, 40 Sup. Ct. Rep. 423.
United States v. *Spearin,* 248 U. S. 132, 63 L. ed. 166, 39 Sup. Ct. Rep. 59.
Christie v. *United States,* 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565.
Hollerback v. *United States,* 233 U. S. 165, 58 L. ed. 898.

In *Jay Cooke, et al.,* v. *United States, supra,* this Court said:

> "Laches is not imputable to the government in its character as sovereign, by those subject to its dominion. *U. S.* v. *Kilpatrick,* 9 Wheat. 735; Gibbons v. *U. S.* 8 Wall. 269. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that governs individuals there. * * * As the Government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world."

The case of *The Falcon,* 19 Fed. (2d) 1009, involved the defense of laches in an admiralty suit instituted by the United States. The District Court for the District of Maryland said:

> "It is quite consistent with the general principle that the public interests shall not be prejudiced by

> the laches or negligence of public officers, that the United States, in its business relations with private citizens, be subject to the general rules of law. * * * There is no real distinction in principle between the duty of the United States to act with reasonable promptness, if it would keep alive its right against an offending vessel, and its duty as the holder of negotiable paper to preserve its right of action against an endorser by giving him timely notice. In the one case, as in the other, *the United States, having entered the field of private rights, must be bound by the established rules.*" (Italics ours.)

The court here cited in support of its reasoning, *Standard Oil Co.* v. *United States, supra,* and further said:

> "* * * Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity."

In the case of *England National Bank* v. *United States,* 282 Fed. 121 (C.C.A. 8th), the court applied against the Government the familiar doctrine of banking law that a depositor to whom cancelled vouchers are returned must examine them within a reasonable time and notify the bank of any fraudulent or altered vouchers. As stated by the court, the rule is that the depositor's failure to do so amounts to "a conclusive admission of the correctness of the account and the legality and justice of the vouchers upon which the bank has a right to rely, and which the depositor may not consequently deny." In other words the rule is that of

estoppel, and the court deliberately applied the rule against the United States upon the reasoning of *Cooke* v. *United States, supra.*

In the case of *Ritter* v. *United States* the plaintiff failed to file a claim for a refund of an overpayment of income tax within the statutory period and pleaded that compliance was unnecessary because the Revenue Field Agent who had discovered the overpayment had assured him that a claim need not be filed and that the overpayment would be refunded as a matter of course. The court said, at page 267:

> "It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. *Walker* v. *United States,* (CC) 139 F. 409; *Cooke* v. *United States,* 91 U. S. 389, 23 L. ed. 237; *United States* v. *Flint,* 25 Fed. Cas. page 1107, No. 15121. The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority." *Ritter* v. *United States,* 28 Fed. (2d) 265.

III

UPON A GIVEN STATE OF FACTS ITS LIABILITY IS THE SAME AS THAT OF ANY OTHER INSURER. *HENCE IT IS ESTOPPED TO DENY PAYMENT OF THE INSURANCE IN THIS CASE BECAUSE OF THE CONDUCT OF ITS AGENTS.*

On the facts of this case the District Court in its Conclusions of Law said:

"That by its failure to explain its allocation of moneys paid, failure to give notice respecting future premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of the alleged lapse." R. 96, 97.

"Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it." *Mutual Life Ins. Co.* v. *Hurni,* 263 U. S. 167, 44 Sup. Ct. Rep. 90, 68 L. ed. 235, 237.

A review of the facts will, it is believed, establish the above proposition of law. As a veteran of the World War James Patrick Mahar was eligible to reinstate his war risk yearly renewable term insurance up to $10,000 and convert it into Government Life Insurance at any time up to and including July 2, 1927. Regulations of the Veterans Bureau set out the conditions for reinstatement and conversion. There has been some confusion as to the pertinent regulations, which are stated in respondent's brief in opposition to the petition for certiorari (Appendix, pp. 19-21) as Regulations No. 14 and 15, dated December 9, 1921. These regulations were amended July 1, 1926, and became §§4096, *et sequa.* The sections pertinent to this case are as follows:

Regulation No. 14, December 9, 1921, amended by Regulation No. 138; July 1, 1926.

Sec. 4096. In every case where reinstatement in whole or in part of lapsed or cancelled yearly renewable term insurance is desired under the provisions of Sec. 4112 hereof, and as a condition to reinstatement, the applicant shall make tender of a remittance payable to the Treasurer of the United States for an amount sufficient to cover two monthly premiums on the amount of yearly renewable term insurance to be reinstated—one for the grace period and the other for the current month. (July 2, 1926.)

Sec. 4097. The yearly renewable term insurance shall be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or (upon his written request made during such month) the first day of the following month.

Sec. 4110. In cases where the applicant desires to convert his lapsed or cancelled yearly renewable term insurance, under the provisions of Sec. 4112 hereof, and as a condition to reinstatement, he shall make tender of a remittance payable to the Treasurer of the United States for an amount sufficient to cover one premium (grace period) on the yearly renewable term insurance to be reinstated and converted, and at least one monthly premium on the converted insurance. (July 2, 1926).

Sec. 4112. Yearly renewable term insurance which has lapsed or has been cancelled may be reinstated, or reinstated and converted at any time on or before July 2, 1927, by the applicant making tender of the premiums as required in Sections 4096, 4110 and 4111, and under the following conditions: * * *.

The blank form supplied by the Bureau and used by Mahar did not provide for the conversion of yearly renewable term insurance into Government Life Insur-

ance (R. 156-158). It was captioned: "Application for reinstatement of yearly renewable term insurance" and was last revised in December, 1924. Therefore Mahar merely applied for the reinstatement of his term insurance in the amount of $5,000 (R. 157) and under Sec. 4096 of the Regulations, *supra,* was required to remit only two premiums on $5,000 term insurance, one for the grace period ($3.35) and one for the current month ($3.95).*

However, under the amendment of July 2, 1926, to the World War Veterans Act, 1924, no yearly renewable term insurance could be reinstated after July 2, 1927, and as the amendment of May 29, 1928, Title 38, U.S.C., c. 10, §512a, extending to all veterans of the World War the privilege of Government Life Insurance if they were in good health, had not yet been adopted, and as all term insurance not converted or matured, or otherwise protected, expired on July 2, 1927, the Bureau construed Mahar's application as being for simultaneous reinstatement of $5,000 of his term insurance and its conversion into Government Life Insurance. It is further noted that Mahar never specified any plan of Government Life Insurance to which his term insurance should be converted (Defendant's Exhibit No. 2, R. 156-158; Provisional Receipt, R. 156), but the Bureau assumed that he desired a "Five Year Convertible Term Policy," and later issued same (R. 118). It is believed the Bureau correctly interpreted

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* Note. These requirements should not be confused with those applying to veterans not in good health, seeking reinstatement of their insurance under Section 304 of the World War Veterans Act, 1924, as amended July 2, 1926, c. 723, §15, 44 Stat. 799, (Appendix to respondent's brief, pp. 16, 17, and Regulation No. 15, pp. 20, 21, do.). They were required to pay all premiums in arrears with interest, or have same set up as a lien on the reinstated insurance.

Mahar's wishes in this respect though it never advised him of the situation, but when it came to the allocation of the remittance of $13.90 which accompanied the application, there is a wide divergence between his wishes and the disposition of the money.

Mahar was required under Section 4112 of the Regulations, *supra,* if the assumption as to his intent is correct, to forward only two premiums; the first, to cover the grace period on the $5,000 term insurance, to be reinstated, amounting to $3.35, and the second, one monthly premium on the converted insurance, which on the policy issued was fixed by the Bureau at $3.95, a total of $7.30. Where or from whom Mahar acquired his information as to payment of premiums is not known but either he was poorly advised or he made his own calculations erroneously for every item in his proposed allocation of the $13.90 remitted was wrong, according to the Bureau.

10. Premiums tendered with Application: (R. 158).

(a) For first month of lapse.....$6.70.
(Correct amount .....$3.35).

(b) For month of July, '27, reinstatement of Term Insurance $3.35*
(Should have been for premium on converted insurance.....$3.95).

(c) Advance premium on Term insurance, $5,000 .....$3.85**

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* It is apparent that Mahar was ignorant of the fact that this premium was based upon his age at his birthday nearest to July 1, 1927, namely, August 28, 1927.

** This error was doubtless due to the fact that Mahar calculated the premium on his age at his last preceeding birthday, August 28, 1926, while the Bureau (R. 118) based its calculations on his age when the policy was issued. This was in September, 1927, and he had had another birthday on August 28, 1927.

(Should have been on Govt. Life Ins. $5,000.....Correct amount .....$3.95).

(d) For first payment on ($5,000 deleted) Government (converted) insurance..... $3.85 deleted).

Total $13.90

(Correct amount to cover above items .....$11.25).

From the foregoing it is evident that Mahar had remitted sufficient money to pay the premium on his term insurance for the grace period in 1919, to cover two premiums on his Government Life Insurance policy, and leave a balance of $2.65 in his favor. In his application Mahar had indicated his desire that the reinstatement should be effective "The first day of the month in which requirements have been complied with" (R. 157). This was in conformity with Sec. 4097 of the Regulations of the Bureau, *supra,* and when Mahar received his policy some time after September 19, 1927, the date of issue (R. 120), he had reason to believe that although it was stated therein that "This policy takes effect on the 1st day of July 1927" it really was not effective until September 1, 1927, as far as the payment of premiums was concerned, in view of his request as to the effective date.

In the case of *McMaster* v. *New York Life Ins. Co.,* the insured had taken out five policies of $1,000 each, and in each policy it was recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of $21, "and of the payment of a like sum on the 12th day of December in every year

thereafter during the continuance of this policy." The application fixed December 12, 1893, as the effective date of the policies, which, however, were not issued until December 18, 1893. A grace period of one month was allowed, and notwithstanding that on November 17, 1894, the company, as required by the New York statute, sent the insured notice of the coming due of the premiums as of December 12, 1894, and a representative of the company called upon the insured on December 11 or 12, 1894, to collect the premiums and he declined to make payment, this Court held the policies were not in force until December 18, 1893, and remained in force by reason of the grace period until January 18, 1895, on which day the insured died. The judgment of the Circuit Court of Appeals was reversed, as was the judgment of the Circuit Court, and the cause was remanded to the latter court with instructions to enter judgment for plaintiff *with interest and costs. McMaster* v. *New York Life Ins. Co.*, 183 U. S. 25, 46 L. ed. 64.

It is clear that the Bureau accepted Mahar's application for the reinstatement of his term insurance as including an application for its conversion into some form of Government Life Insurance; that it selected the form of policy into which the term insurance should be converted; that it fixed July 1, 1927, as the effective date of the policy though not issuing it until September 19, 1927; that it made an allocation of the remittance from Mahar to premiums entirely different from that proposed by him; and that it credited him with premiums on his converted insurance for July and August, leaving a balance of $2.65 on hand unapplied. It is further clear that while on or about August 1, 1927, it

communicated with Mahar (Plaintiff's exhibit No. 3, Provisional Receipt, R. 136), and again on or after September 19, 1927, when he was sent the policy of Government Life Insurance, the Bureau made no attempt whatever to inform him of the allocation of his remittance of $13.90, or of the status of his insurance, until some time in January, 1928, when he was advised that his policy had lapsed for his failure to pay the premium due September 1, 1927 (Plaintiff's exhibit No. 5, R. 140, 141, Form 772, sent by Bureau January 9, 1928, R. 169). In other words, the insured, although he lived to within a few days of six months after he remitted the $13.90 with his application, and more than three months after his policy was issued and received, never knew what disposition had been made of his remittance, or of the two subsequent remittances of $3.95 each, had no information that he was in arrears, and died believing his policy to be in full force and effect.

> "Any acts, declarations, or course of dealing by the insurers with knowledge of the facts constituting a breach of a condition in the policy, recognizing the policy as still in force and leading the assured to regard himself as still protected thereby, will amount to a waiver of the performance of the conditions of the policy, and will estop the company from setting up the same as a defense when sued for a subsequent loss." 14 R.C.L. 1182, citing *Viele* v. *Germania Ins. Co.,* 26 Ia. 9, 96 Am. Dec. 83, and note.

As a matter of fact the communication of January, 1928, gave no information as to the allocation of the $13.90 (R. 141). It refers to money "received" as $10.55, and states that the premiums due through Janu-

ary, 1928, amounted to $19.75, so the premium balance due was $9.20. As meanwhile there had been two remittances of $3.95 each the disposition of the $13.90 remained an enigma.

It was not until March 21, 1928, that the Veterans Bureau advised as to the allocation of the $13.90 (R. 145, 146) and those interested were for the first time informed how and why the Bureau arrived at the conclusion that the policy had lapsed for the non-payment of the premium due September 1, 1927. This correspondence was long after the death of the insured on December 24, 1927; nothing was said to him during his lifetime about the alleged lapsing of his policy although he lived nearly four months after the date of the alleged lapse. On or about November 2, 1927, the Bureau had received a remittance of $3.95 and another remittance of the same amount on or about December 20, 1927. Adding these amounts to the $13.90 it is clear the Bureau had in hand sufficient funds to cover the premium on the term insurance for the grace period, $3.35, and monthly premiums on the Government Life Insurance policy at $3.95 each, for July, August, September and October, 1927, with a balance to the credit of the insured of $2.65. The policy matured October 17, 1927, when the insured became totally and permanently disabled (R. 94) after which no more premiums were required. As the latter date was within the grace period from September 1, 1927, it was immaterial whether the premium for October 1, 1927, was paid or not. Thus we find that on September 1, 1927, the insured had a credit of $2.65, followed by two remittances of $3.95 each, or a total credit of $10.55 against the premium of $3.95 due September 1, 1927. No effort was

made to return this money or any part thereof during the lifetime of the insured (Findings of fact, R. 96), or to communicate with him concerning it, and as far as the record shows it is still on deposit in the Government Life Insurance Fund.

In the case of the *Phoenix Mutual Life Insurance Company* v. *Doster,* 106 U. S. 30, 27 L. ed. 65, exception was taken to the charge of the trial court. In his summary of the charge Mr. Justice Harlan said:

> "It said, in substance, that if the conduct of the company in dealing with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at that day, would not be enforced if payment were made within a reasonable time thereafter, the Company ought not, in common justice, to be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment; and that if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly *or by receiving and retaining the premiums, with full knowledge of the circumstances,* the same consequences should follow." (Italics supplied.)

See also *New York Life Ins. Co.* v. *Dumler,* 282 Fed. 969 (C.C.A. 5th).
Brooklyn Life Insurance Co. v. *Miller,* 12 Wall. 285, 20 L. ed. 398.

It is significant that although, if the policy had lapsed for the non-payment of the premium due September 1, 1927, that fact was known to the Bureau on October 2, 1927, at the latest, no attempt was made to notify Mahar

until January, 1928, when, of course, it was too late for him to do anything about it as he was dead. If he had been advised when his policy was sent to him that he should remit an additional $1.30 to cover the premium for that month is there any doubt but that he would have done so? Should the Bureau have sent him the policy at all until the premium for September was paid, or without notifying him that it had not been paid? He had remitted a premium for July, 1927, and an "Advance premium on Term insurance." Receiving the policy in September he had a right, in the absence of information to the contrary, to believe that his remittance covered the premium due that month. As a matter of fact, it was not until January, 1928, that the Bureau worked out any allocation of the remittance of $13.90 and arrived at the conclusion that the policy had lapsed (R. 140, 169), and the receipt of the second $3.95 was not entered until January 27, 1928.

In *New York Life Insurance Co.* v. *Eggleston,* 96 U. S. 572, 24 L. ed. 841, 842, the chief element of estoppel was failure, as found by the jury, to give sufficient notice where the premium was to be paid. This Court pointed out that "we are dealing with the question of forfeiture for not paying at the very day * * *," and said:

> "We have recently, in the case of *Insurance Co.* v. *Norton,* shown that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, *or course of action,* on the part of an insurance company, which leads a party insured honestly to believe that by conforming

thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture." (Italics ours.)

In respondent's brief in opposition to certiorari at page 6 it is argued that the policy contained a provision that the monthly premium was $3.95 thus indicating to the veteran the mistake in his proposed allocation, and on page 8 it is maintained that no effort was made to reinstate the policy "and even if reinstatement had been sought after October 2, 1927, the state of the veteran's health would have precluded compliance with the conditions of the policy in that regard."

In view of the fact that it took the experts of the Bureau, who made the final allocation of the $13.90 and who passed upon the application and issued the policy, until January 9, 1928—to reach the conclusion that the premium due September 1, 1927, had not been paid and the insurance was therefore forfeited, it is rather harsh to charge Mahar with that knowledge back in September, in the absence of any information as to the disposition made of his $13.90. He certainly is to be credited with an attempt to keep his policy in force.

A case in which certain circumstances are similar to those of the case at bar is that of *The Hartford Life and Annuity Insurance Co.* v. *Unsell,* 144 U. S. 439, 36 L. ed. 496. In that case the statement by Mr. Justice Harlan shows that the insured, who was the husband of the plaintiff, had failed to pay the monthly dues for January, 1886, on or before the due date, January 1, 1886.

On January 21, 1886, the insurance company mailed a postal card calling attention to this fact, which was received on or about January 26, 1886. A health statement was called for to insure reinstatement. Mrs. Unsell, on January 28, 1886, mailed $5 dues for her husband's account, but paid no attention to the request for a health statement. The remittance was received on February 1, 1886, and the same day the company sent a reinstatement account again calling for a good health statement. But on January 31, 1886, the insured had died, and on being so informed the Insurance Company returned the remittance of January 28, attention being called to the lapse of membership as of January 1, 1886. Evidence was introduced to show the course of business between the assured and the company during the whole period covered by the certificates, in respect to the payment of dues after the date fixed in the contracts of insurance. The contracts contained the usual provisions as to the payment of dues and assessments and that they should become null and void if same were not paid on the due date. It does not appear that the Insurance Company was required to give notice of when the monthly dues were due, or to take other steps to collect them.

The defendant in the court below had excepted to the refusal of the court to grant certain instructions to the jury, and also to the charge as given. Much of the charge is set out in the opinion of this Court, which says that the law applicable to the case was stated to the jury with substantial accuracy. From the charge the following is quoted:

> "The question for you to consider and determine is whether, as a prudent business man, he had a

right to believe that it was immaterial whether he paid on the day or a few days later."

Referring to the charge the opinion says: "The charge was in entire consonance with the settled doctrines of this court as established in the cases to which we have adverted," and the judgment in favor of the plaintiff was affirmed.

In the case at bar the insured had made a remittance with his application, admittedly more than sufficient to pay premiums for more than three months including the premium due on the lapsed term policy. Two subsequent remittances were made, and he died almost six months after reinstating his insurance without an intimation of any kind that he was behind in his premium payments. We reiterate that he died believing, and having every right to believe, that his policy was in full force and effect, and that he had paid his premiums as they fell due.

IV

INTEREST SHOULD BE ALLOWED

In the District Court petitioner asked that interest be allowed from December 24, 1927, and costs (R. 8), but no provision for interest or costs was made in the judgment nor was there any reference thereto in the conclusions of law by the District Court or in its opinion. It is assumed that all concerned were under the impression that the question had been determined by this Court in its answer to the third and fourth questions certified in the case of *United States* v. *Worley,* 281 U. S. 339, 50 Sup. Ct. Rep. 291, 74 L. ed. 887, and *Jackson* v. *United States,* 281 U. S. 344, 345, 74 L. ed. 891, decided the same day.

The attention of the Court is respectfully invited to the fact that the *Worley* and *Jackson* cases involved claims against the United States upon contracts of *yearly renewable term insurance,* and that if interest and costs had been allowed in these and similar cases, same would have been paid by the United States. In the case at bar the claim is on a contract of Government Life Insurance and against the Government Life Insurance Fund to which the United States has contributed nothing, and it is believed the question of interest is controlled by *Standard Oil Co. of N. J.* v. *United States, supra.* See also *McMaster* v. *New York Life Ins. Co., supra.*

The only case in which, as far as counsel is advised, interest was allowed where recovery was made by suit upon a policy of "converted" or Government Life Insurance, was that of *Wilkinson* v. *United States,* 37 Fed. (2d) 918 (D. C. W. D. S. C.). In the *Wilkinson* case, which was coupled with *Shealy* v. *United States,* and *Siebert* v. *United States,* which were suits for war risk yearly renewable term insurance, the court in the opinion said:

> "Where, however, under statutory authority the government has entered into the business of insuring life or property, for a monetary consideration and has issued insurance policies or contracted to do so in the method and substantially the form adopted by business corporations, and has by such policies contracted to pay a sum certain upon the happening of a determined or determinable date, interest will accrue upon the amount so designated from the due date as in other business transactions founded on contract; such cases being governed by the commercial character of the obligor, whose

sovereign immunity has been waived because of statutory authority to sue."

There seems to be no good reason why the Government Life Insurance Fund, which is made up of contributions by the policy-holders, interest upon investments of such contributions, and the withholding of dividends from the policy-holders, should profit to the extent of the interest properly due this estate. It has been seven years since the policy matured and the interest upon the principal sum of $5,000 at 6% per annum would amount to $2,100. Meanwhile this $5,000 has been put out at interest for the benefit of the Fund.

It is believed the widow and children of the insured are more entitled to this interest than the Government Life Insurance Fund, and they are much less able to bear the costs of this litigation.

CONCLUSION

For the reasons set forth petitioner believes this Court should reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court, with an allowance of interest and costs.

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